



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: HBH, Inc.
File: B-225126
Date: February 26, 1987

DIGEST

Bid was properly rejected as nonresponsive when an accompanying commercial rate schedule caused bid to vary from the terms and conditions of the IFB and to fail to include a firm, fixed price.

DECISION

HBH, Inc., protests the rejection of its apparent low bid as nonresponsive under invitation for bids (IFB) No. DACW29-86-B-0110, issued by the Corps of Engineers for pile dike repairs in the Mississippi River, Baton Rouge to Gulf of Mexico southwest pass. The IFB contemplated the award of a firm, fixed-price contract. The Army rejected HBH's bid because included with it was the firm's own rate schedule, which varied from the material provisions of the IFB and provided for piecemeal charges for work listed in the IFB Schedule, and because HBH qualified its bid by taking exception, in a footnote to the IFB Schedule, to an item of work listed therein. HBH contends that it included its own rate schedule only for informational purposes and that the schedule was not intended to be part of its bid. HBH also contends that the footnote to the item of work on the IFB Schedule was not a "qualification" of its bid but a "clarification" of an unclear specification. HBH adds that this "clarification" was consistent with information it received in a telephone conversation with an Army employee. By way of a remedy, HBH asks that it be awarded its lost profits equal to 10 percent of its bid price.

We deny the protest.

In order to be deemed responsive, a bid must unequivocally offer to provide the requested items and meet the material specifications. General Electric Company, 65 Comp. Gen. 377 (1986), 86-1 C.P.D. ¶ 223. Thus, a bid must be rejected if it varies from the terms and conditions of the solicitation,

limits the firm's contractual obligations, or does not offer to perform at a firm, fixed price where a fixed-price contract is contemplated. See General Electric Company, 65 Comp. Gen. at 378, 86-1 C.P.D. ¶ 223 at 2. Furthermore, a bidder's intention to be bound by the solicitation requirements and provide the requested items must be determined from the bid itself at the time of bid opening. See Franklin Instrument Co., Inc., B-204311, Feb. 8, 1982, 82-1 C.P.D. ¶ 105. Any extraneous documents submitted with a bid, including a rate schedule, must be considered a part of the bid for purposes of determining the bid's responsiveness. See Free-Flow Packaging Corporation, B-204482, Feb. 23, 1982, 82-1 C.P.D. ¶ 162.

With no explanation, HBH attached to its bid a detailed 17-page rate schedule listing piecemeal charges for use of personnel, equipment, and other items. HBH also placed an asterisk next to item No. 5, "Removal of Existing Piles and Wales," on the IFB Schedule and stated in a footnote at the bottom of the page that "(t)his price is based on breaking piles off below mudline."

Taken alone, HBH's inclusion of its rate schedule with its bid is a sufficient ground upon which to reject the bid as nonresponsive. The rate schedule was attached to the bid and must be considered a part of the bid, as noted above, for purposes of determining responsiveness. Although HBH now states that the rate schedule was a "promotional document" included only for informational purposes "in the event that extra work, if any, would arise in the future," and was not meant to be a part of the bid, no such explanation was attached to the rate schedule at the time of bid submission. Since only material available at bid opening may be considered in making a responsiveness determination, HBH's post-opening statements concerning its intent cannot be considered in determining the responsiveness of its bid. See Franklin Instrument Co., Inc., B-204311, supra, at 3, 82-1 C.P.D. ¶ 105 at 3.

HBH's rate schedule caused its bid to vary from the terms and conditions of the IFB and fail to include a firm, fixed-price. In his report, the contracting officer points out many discrepancies between HBH's rate schedule and the IFB. For example, paragraph II.C of HBH's rate schedule directly conflicts with IFB clause 49, "Permits and Responsibilities." HBH's schedule states that permits needed to move equipment will be procured and paid for by the Army; whereas, the IFB clause states that the contractor shall, without additional

expense to the government, be responsible for obtaining any necessary licenses and permits. In addition, HBH's rate schedule contains many piecemeal charges, requiring price adjustments, for work contained within the scope of the bidding schedule. For example, under HBH's rate schedule, the Army, not HBH, would pay for: (1) room and board if personnel do not return to the yard each day; (2) transportation of those personnel to the yard; (3) transportation charges for pickup and delivery of equipment, and (4) truck and tool charges for each truck requiring tools. These and other piecemeal charges conflict with the IFB provisions calling for a firm, fixed price, as reflected in IFB clause 70, "Contract Prices - Bidding Schedules." Since the purpose of a fixed-price contract is to bind the contractor to complete the work at a fixed amount of compensation regardless of cost of performance, HBH, in order to offer a firm, fixed price, was required to include in its contract unit prices all direct and indirect costs of performance of the units of work listed in the bidding schedule. HBH's unit prices were not firm but were variable to the extent the various piecemeal charges contained in its rate schedule would arise. Thus, HBH's bid did not offer a firm, fixed price. See General Electric Company, 65 Comp. Gen. at 378, 86-1 C.P.D. ¶ 223 at 2. HBH's bid was, therefore, properly rejected as nonresponsive since it varied from the terms and conditions of the IFB and failed to offer a firm, fixed price. In view of this conclusion, it is not necessary to address the other basis for finding HBH nonresponsive.

Finally, with respect to HBH's request that it be awarded its profits anticipated from this contract, we note that there is no legal authority which would permit the recovery from the government of anticipated profits, even if we were to sustain the protest. See A&A Realty, Inc., B-222139, June 20, 1986, 86-1 C.P.D. ¶ 575.

The protest is denied.

for *Seppan Egan*
Harry R. Van Cleve
General Counsel